No. 425A21-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION; et al., Plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor

and

RAFAEL PENN, et al., Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

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ORDER

Plaintiffs' motion and suggestion of recusal was referred to the Court by a special order entered by Justice Berger on 5 February 2024. In entering the special order, Justice Berger acted pursuant to this Court's order of 23 December 2021 ("Recusal Procedure Order"), which establishes a procedure for the disposition of motions seeking the recusal or disqualification of a Justice from a matter pending before the Court. 379 N.C. 693 (2021). Under the Recusal Procedure Order, a Justice may either (1) rule on the recusal or disqualification motion or (2) refer the motion to the Court. *Id.* This is the second case in which Justice Berger has referred a motion to the Court for disposition. *See also Holmes v. Moore*, 384 N.C. 191, 191 (2023) (dismissing unanimously a disqualification motion referred to the Court by Justice Berger). The motion in the other case requested Justice Berger's disqualification on grounds similar to those raised here.

Plaintiffs' pending motion essentially restates an earlier motion filed by plaintiffs in this case that sought Justice Berger's recusal based on his familial relationship to intervenor-defendant Senator Philip E. Berger, who is a party to this litigation solely in his official capacity as President Pro Tempore of the Senate. Justice Berger denied plaintiffs' first recusal motion in a special order entered on 19 August 2022. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692, 692 (2022). The order cites legal authorities including N.C.G.S. § 1-72.2, which provides that the President Pro Tempore of the Senate and the Speaker of the House of Representatives act as

"agents of the State" and not in their individual capacities when they intervene in lawsuits challenging state laws. *Id.; see also NAACP v. Moore*, 380 N.C. 263, 264 (2022) (explaining that Justice Berger was not required to recuse when Senator Berger was sued purely in his official capacity because "a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual."). Senator Berger thus remains an intervenor-defendant in this case simply by virtue of his continued service as President Pro Tempore of the Senate. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 731 (2022) (substituting the Acting State Controller for the retiring State Controller in appellate proceedings).

Because it offers no new grounds for recusal, plaintiffs' pending recusal motion amounts to an impermissible challenge to Justice Berger's denial of their first motion. Under the Recusal Procedure Order, when a Justice rules on a recusal or disqualification motion, "[t]hat determination shall be final." 379 N.C. at 693. The motion is therefore dismissed.

By order of the Court in Conference, this the 16th day of February 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of February 2024.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
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Judge Michael L. Robinson, Attorney at Law - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, For State of N.C. - (By Email)
Mr. Matthew Tulchin, Special Deputy Attorney General, For State of N.C. - (By Email)
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Mr. Thomas J. Ziko, Attorney at Law, For State Board of Education - (By Email)
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Justice RIGGS dissenting.

Impartiality—maintained in fact as well as for appearances—is central to the functioning of our state's courts. *N.C. Nat. Bank v. Gillespie*, 291 N.C. 303, 311 (1976). And this Court has historically observed this objective principle in *every* case, great or small. *See, e.g., Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103 (1984) ("It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case . . . . This right can neither be denied nor abridged.")).

Recently, in the face of recusal motions in a number of politically-charged cases, this Court decided, pursuant to an administrative order entered by this Court on 23 December 2021 after extensive briefing from multiple parties and amici, that when a motion is "filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final." *Order Concerning Recusal Motions*, 379 N.C. 693 (2021). The order provided that, in the alternative, the subject Justice may refer the motion to the full court, but this Court neither required that nor suggested that there was anything improper about a subject Justice exercising the right to decide on recusal motions targeting him or her. *Id.*

In this instance, Justice Berger has opted for the alternative approach, referring the motion to the entire Court because "members of this Court should strive to fortify public trust, and unilateral action in this matter could undermine public confidence." *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). In my view, this unnecessary commentary itself undermines public confidence in the Court. This Court decided in 2021 that it was appropriate for an individual Justice to decide, with finality, motions requesting his or her recusal. To suggest that following that procedure, expressly approved by this Court, "could undermine public confidence,"—particularly when, mere days earlier, Justice Earls issued a detailed opinion explaining her decision to deny a recusal motion filed by Senator Philip E. Berger, Sr., and the other legislative defendants targeting her in this same case—can only serve to fuel public attacks on a Justice who followed the proscribed administrative rules for addressing recusal motions. Since the entry of that 2021 administrative order, Justice Berger took unilateral action on recusal motions in at least three matters. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (Berger, J.) (2022); *Harper v. Hall*, 380 N.C. 272 (Berger, J.) (2022); *N.C. NAACP v. Moore*, 380 N.C. 263 (Berger, J.) (2022). Why would it "undermine public confidence" here and not in those cases?

In his order, Justice Berger also expresses the opinion that "the substance of this motion has already been decided" and further suggests the filing is sanctionable. *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). Signaling to one's colleagues what action should be taken and how one would vote, before then referring

the motion to one's colleagues, makes the decision to refer to the entire Court seem performative rather than substantive. And Justice Berger has clearly found a receptive audience in the majority, which dismisses the recusal motion without even purporting to independently decide the question presented.

Regardless, because this matter was referred to the entire Court by Justice Berger's own choice, my conscience requires addressing the merits of the motion—as a constitutional officer, I cannot ignore the merits of a motion presented to me. Beyond the generalities common to all cases, it seems uncontroversial that impartiality concerns weigh particularly heavy in those disputes where our State's highest court—our Supreme Court—seeks to apply its highest legal authority—the North Carolina Constitution—to review the actions of a co-equal branch state government—the General Assembly. In fact, worries of undue judicial interference help form one of the very bases of our jurisprudence concerning review of legislative acts. *See State v. Revis*, 193 N.C. 192, 195 (1927) ("[C]ourts do not undertake to say what the law ought to be; they only declare what it is. . . . It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject."); *cf. Corum v. Univ. of North Carolina*, 330 N.C. 761, 784 (1992) ("[I]n exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong."). Little wonder, then, that the glare of public scrutiny is particularly focused on this

Court when it deliberates on a case implicating the constitutional rights of *every child in the State*.[1]

Just as a case of almost universal constitutional magnitude invites closer inspection and graver concern for impartiality, so, too, does the nature of the relationship at issue in this recusal motion. Few bonds are closer and more enduring than that between a loving parent and child. "The tender ties of love and sympathy existing between . . . parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart." *Cashion v. Western Union Telegraph Co.*, 123 N.C. 267, 274 (1898). So strong are those familial ties that the law itself defaults to those connections to do the greatest justice in myriad circumstances. *See, e.g.,* N.C.G.S. § 29-15 (2023) (providing for a child's inheritance by intestacy); N.C.G.S. § 7B-906.2(b) (2023) (generally requiring family reunification as a primary or secondary permanent plan in abuse, neglect, and dependency cases); *Peterson v. Rogers*, 337 N.C. 397, 400-05 (1994) (recognizing a presumption at law favoring parents over other relations in child custody disputes).

[1] *See, e.g.,* T. Keung Hui, *NC Supreme Court schedules Leandro school funding case. Here's when it will be heard.*, The News & Observer (Dec. 21, 2023), https://www.newsobserver.com/news/local/education/article283389133.html; *Long-running North Carolina education case will return before the state Supreme Court in February*, The Coastland Times (Dec. 30, 2023), https://www.thecoastlandtimes.com/2023/12/30/long-running-north-carolina-education-case-will-return-before-the-state-supreme-court-in-february/; *Berger submits Leandro recusal request to full Supreme Court*, The Carolina Journal (Feb. 5, 2024), https://www.carolinajournal.com/berger-submits-leandro-recusal-request-to-full-supreme-court/; Greg Childress, *North Carolina Supreme Court hearing scheduled for Leandro school funding case*, NC Newsline (Dec. 22, 2023, 5:00 PM), https://ncnewsline.com/briefs/north-carolina-supreme-court-hearing-scheduled-for-leandro-school-funding-case/.

In a feat of inescapable common sense, our canons of judicial conduct recognize this reality, and provide that judges should not decide cases where their parents or children are parties. *See* N. C. Code of Judicial Conduct, Canon 3.C.(1)(d) (providing that the participation of a judge's child or parent as a litigant, lawyer, or interested party is an "instance[ ]" wherein "the judge's impartiality may reasonably be questioned" such that recusal is warranted). Decisions from other jurisdictions reaffirm this straightforward notion. *See, e.g., Comm'n on Judicial Performance v. Bowen*, 123 So.3d 381, 384 (Miss. 2013) (holding a trial judge's failure to recuse from asbestos litigation was judicial misconduct where his parents had previously sued and settled asbestos exposure claims against the defendants "because a reasonable person, knowing all the circumstances, would have doubts regarding [the judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 694 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality concerns "required [the judge] to recuse himself in cases involving family members").

I recognize that these concerns might not arise in every case where the State, writ-large, is hauled into court by an individual's suit challenging governmental action. *See N.C. NAACP*, 380 N.C. at 263 (Berger, J.) (declining to recuse from a suit against the State because "my father's name appears in the caption only as a matter of procedure" as a necessary defendant). But that is not the circumstance we have here; the Legislative-Intervenors, including Senator Philip E. Berger, Sr., maintain

in this appeal—rightly or wrongly—that they have not historically been defendants in this litigation. Justice Berger (and two justices voting in the majority to dismiss this motion) has previously agreed with this conception of the case. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 506 (Berger, J., with Newby, C.J., and Barringer, J., dissenting) ("[T]he General Assembly was never joined as a necessary party[.]"). *But see Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 635 (2004) ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . ."). In their own view, Legislative-Intervenors—again, the lead Senator being the father of Justice Berger—have affirmatively inserted themselves into this lawsuit. Whatever the rationale for avoiding recusal, it cannot be because this is simply a "suit against a government official in his or her official capacity." *N.C. NAACP*, 380 N.C. at 264 (Berger, J.). Indeed, one could reasonably conclude that Legislative-Intervenor's injection of themselves into this litigation in pursuit of positive relief *heightens*, rather than diminishes, the appearance of impropriety here.

Other disquieting facts appear on the face of the record and undercut assertions that this is a suit in which Senator Berger appears in his "official capacity" only as a matter of procedure rather than as the result of a substantive policy choice with personal consequences. In addition to the mere fact of the parent-child relationship, our canons identify impropriety where a parent of the judge "[is] known to have an interest that could be substantially affected by the outcome of the

proceeding." N.C. Code of Judicial Conduct, Canon 3.C.(1)(d)(iii). Here, Justice Berger's father, as one of the named Legislative-Intervenors and leader of the majority party in the Senate, has repeatedly tied his policy objectives to the maintenance of a multi-billion-dollar surplus. *See, e.g.,* Colin Campbell, *If GOP gets its way, budget surplus will lead to more tax cuts*, WUNC (Feb. 27, 2023, 4:56 PM), https://www.wunc.org/politics/2023-02-27/if-gop-gets-its-way-budget-surplus-will-lead-to-more-tax-cuts. Indeed, he is presently campaigning on it individually and as leader of his caucus. *Budget*, Phil Berger: North Carolina Senate, https://www.philberger.org/budget (last accessed Feb. 6, 2024). Any opinion from this Court reversing or setting aside the trial court's order drawing down funds against that surplus necessarily bears upon Senator Berger's ability to deliver on his policy objectives and the campaign promises he has made to voters in seeking to maintain his elected office. Put bluntly, a son's vote to deliver his father a campaign "win" *in an election year* substantially affects the latter's personal and financial interests.[2]

Nor am I convinced that this motion is inappropriate because circumstances

[2] The Justice Berger was himself popularly elected does little to dispel any appearance of impropriety. See *N.C. NAACP*, 380 N.C. at 264 (Berger, J.) ("More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my fathers service in the Legislature, elected me to consider and resolve significant constitutional questions."). Voters also expect elected judges and justices to recuse themselves when their connection with litigants causes their impartiality to be reasonably questioned. N. C. Code of Judicial Conduct, Canon 3.C.(1)(d); *see also N.C. Nat. Bank*, 291 N.C. at 311 ("[E]very man should know that he has had a fair and impartial trial, or, at least, that he should have no just ground for the suspicion that he has not had such a trial." (cleaned up)).

have not changed.[3] In the fifteen months since our last decision in this case, the American public has taken a magnifying glass to the conduct of our country's most powerful jurists. *See Friends of the Court*, ProPublica, https://www.propublica.org/series/supreme-court-scotus (last accessed Feb. 5, 2023). One U.S. Supreme Court justice took to the op-ed pages of a paper of record to address these concerns. Samuel Alito, *Justice Samuel Alito: ProPublica Misleads Its Readers*, The Wall Street Journal (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?mod=opinion_lead_pos5. And the country's highest court saw fit to adopt a formal code of conduct for the first time in its history. Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023).[4] Now, more than ever, it is vital that our courts "not only be impartial in the controversies submitted to them but shall give *assurances* that they *are* impartial, free . . . from any bias or prejudice . . . , [and thus] shall also *appear* to be impartial." *Ponder v. Davis*, 233 N.C. 699, 705 (1951) (cleaned up) (emphasis added).

In sum, given the legal significance of this case and the undeniably and

[3] I note that nothing in our appellate rules requires a party to assert different facts than those previously raised in a recusal motion in an earlier appeal when pursuing a recusal motion in a *new* appeal from a different trial court order, particularly when that prior motion was denied without expressing a substantive rationale. *See Order*, *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (2022) (Berger, J.).

[4] Not coincidentally, that code of conduct also identifies parent/child relationships between judges and litigants as circumstances "in which the Justice's impartiality might reasonably be questioned" such that recusal is proper due to "doubt that the Justice could fairly discharge his or her duties." *Id.*, Canon 3.B.(2).

uniquely close relationship between Legislative-Intervenor Senator Philip E. Berger, Sr.—who seeks to have this Court overturn its previous ruling forcing the State to comply with the State Constitution—and the subject justice, Associate Justice Philip E. Berger, Jr.—the author of the dissent decrying this Court's decision to require the legislative branch (including his father) to fully fund public education, *Hoke Cnty.*, 382 N.C. at 477 (Berger, J., with Newby, C.J., and Barringer, J., dissenting)—I would vote to allow this motion to ensure that the fundamentally necessary appearance of impartiality can be maintained in this case. *N.C. Nat. Bank*, 291 N.C. at 311. As difficult as it may be, "judges must bear the primary responsibility for requiring appropriate judicial behavior. . . . The same is true for justices." Code of Conduct for Justices of the Supreme Court of the United States, cmt. 13–14 (cleaned up). Common sense dictates that some bonds are simply too close, and some circumstances simply too pointed, for any judicial order of this Court—short of allowing plaintiffs' motion—to exorcise the specter of doubt lingering in the minds of the public in this case. Recusal is the sole sacrament, and I would solemnly invoke it here. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.